Supreme Court, U.S.
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JAN 14 1986
JOSEPH F. SPANIOL, JR.
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No. 85-670

IN THE

Supreme Court of the United States

October Term, 1985

ETHYL CORPORATION,
Petitioner
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a labor arbitrator has the power to imply from the written provisions of a labor contract a commitment that a company will not, by shutting down a plant, render it impossible for otherwise-eligible employees to obtain a paid vacation.

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INTRODUCTION

In this case, a labor arbitrator awarded 1981 vacation pay to the victims of a December, 1981, plant shutdown. Under the written provisions of the contract, the employees would ordinarily have been entitled to a vacation in 1982 if they had worked 1,040 hours in 1981 and been "on the payroll . . . on December 31" of 1981. All of the employees worked over 1,040 hours in 1981, but on December 4 of that year, the Company shut down the plant.

After examining the parties' negotiating history and contract language, the Arbitrator concluded that the contract did not allow the Company to deprive employees of a 1982 vacation for the mere reason that they were not "on the payroll" as of December 31, 1981, when the Company had made it impossible for them to do so by shut-

ting down the plant. The arbitrator's ruling mirrored those of most federal courts and many arbitrators faced with the same issue.

In a 3-0 decision, the United States Court of Appeals for the Seventh Circuit concluded that the arbitrator's award "drew its essence" from the collective bargaining agreement and ordered that the award be enforced. Ethyl Corporation now seeks review in this Court, claiming there is a conflict in the Circuits on a serious and substantial issue, namely, whether a labor arbitration award may deviate from the "plain" and "unambiguous" provisions of a contract.

In this Brief, we oppose *certiorari* by showing: (1) the arbitrator adjudicated a common labor relations problem in a wholly conventional manner; (2) contrary to Petitioner's assumption, the labor contract (and past practice thereunder) supplied the arbitrator with neither a "plain" nor an "unambiguous" answer to the issue before him. Thus, the Seventh Circuit ruling could not possibly conflict with other Circuit Court decisions said to involve such crystal clear provisions; (3) if the Seventh Circuit holding is given an appropriately narrow reading, it not only does not conflict with, but actually parallels, the only other Circuit Court case to decide the precise issue involved here; (4) even under the broader reading given by the Petitioner to the decision below, the Circuit Courts are in no *present* conflict. This is because as recently as 1983 this Court strongly re-affirmed the well-established rule requiring the courts to accord broad deference to labor arbitration rulings—right or wrong —so long as they are interpretations of a labor contract. *W. R. Grace and Company v. Local Union 759, United Rubber Workers*, 461 U.S. 757 (1983). Thus, *W. R. Grace* answers the question posed by this case and there is no

compelling need for this Court to repeat that answer at this time. Based upon all of these considerations, there are no "special and important" reasons for granting *certiorari* here. (Sup. Ct. Rule 17.)

STATEMENT OF THE CASE

This case arises out of the December, 1981 shutdown of a chemical plant operated by Ethyl Corporation (the "Company" or "Petitioner") in Terre Haute, Indiana. For years prior to the shutdown, the United Steelworkers of America, AFL-CIO-CLC, and its Local 7441 (the "Steelworkers Union") served as the exclusive bargaining representative of production and maintenance employees of the plant. This dispute arose in the midst of a 1980-1983 labor contract.

Under that contract, an employee enjoyed eligibility for a paid vacation in a calendar year if, in the prior year, he worked a minimum of 1,040 hours and was "on the payroll" as of December 31 of the prior year. Under past application of this rule, the December 31 requirement had not been applied to certain employees, namely, those who were on vacation or disability leave as of the December 31 date. A separate contractual provision applied to workers *laid off* as of December 31 (who nevertheless had worked the 1,040 hours earlier in the year). For them, the contract afforded a paid vacation in the next calendar year in which they completed 200 hours of work. (JSA at 42-43, 99-101, 104.)

On October 15, 1981, the Company announced its intention to shut down its Terre Haute plant. In a news release announcing the shutdown, the Company emphasized that the Steelworkers Union had cooperated in attempts to improve plant efficiency, but that bad business conditions compelled the plant closing. Over the

next two months, the Company released the 33 employees on its active payroll; the last day worked by any employee was December 4, 1981, when the plant ceased all operations. (JSA at 22, 30, 23.)

As is usually the case, the plant shutdown was a first-time occurrence; the parties had no "past practice" addressing the question of vacation pay rights in the circumstances of a shutdown. Although all 33 employees had worked more than 1,040 hours in 1981, the Company denied 30 of them a 1982 vacation on the grounds they were not "on the payroll" as of December 31. For three employees who were on disability throughout the last months of 1981, the Company granted 1982 vacations. (JSA at 68-69, 24.)

The Steelworkers Union pursued a grievance on behalf of the 30 employees, eventually invoking "final and binding" arbitration to determine whether they were entitled to 1982 vacation pay. As their arbitrator, the parties selected Charles Ipavec, a member of the National Academy of Arbitrators. (JSA at 24-25, 32.)

The Arbitrator sustained the Union's grievance. (App. at A-37.) ("App." refers to the Appendix materials accompanying the Petition for a Writ of Certiorari.) The Arbitrator's opinion rested on four findings and conclusions:

1) In negotiating the contract, neither the Company nor the Union contemplated that their vacation eligibility provisions would apply in a plant shutdown situation. Rather, the parties negotiated those provisions on the assumption that the plant would continue operations through the duration of the contract. (App. at A-34 and 35.)
2) The parties *had* addressed the effect of a *layoff* on vacation eligibility. Their "200-hour-

provision" (referred to at page 3, *supra)* demonstrated the parties' intent to give workers who were not "on the payroll" as of December 31 through no fault of their own a *chance* to attain a "following-year" vacation. (App. at A-35.)

3) For purposes of contract interpretation, a shutdown is different from a layoff. In a plant shutdown, the Company renders it impossible for displaced workers ever to attain a vacation by working 200 hours in the following year. In a layoff, workers retain that possibility. Thus, an arbitrator may treat the victims of a shutdown differently than those affected by a layoff. (App. at A-34 through 36.)

4) Based on the foregoing, the Arbitrator concluded that the Company could not rely on the December 31 requirement to deprive the employees of 1982 vacation because the Company's action had prevented employees from satisfying that requirement. Accordingly, the Arbitrator awarded that the grievance be sustained. (App. at A-36 and 37.)

The Company sued in the United States District Court for the Southern District of Indiana to overturn the Arbitrator's award. The Union counter-claimed for enforcement. Each action arose under Section 301 of the Labor Management Relations Act of 1947, as amended. 29 U.S.C. §185. (JSA at 1-7.)

On the vacation pay issue, Judge James E. Noland found himself "persuaded by the analysis set forth in *Bucholtz v. Swift & Company,* 609 F.2d 317 (8th Cir. 1979), *cert. denied,* 444 U.S. 1018 (1980)". (App. at A-21.) (See *infra* at 9). In accordance with his view that only

one interpretation of the contract was possible, he vacated the award. (App. at A-21 and 22.)

In an appeal taken by the Steelworkers Union, the United States Court of Appeals for the Seventh Circuit reversed the District Court in a 3-0 opinion. Judge Richard A. Posner wrote for the unanimous panel. In preliminary remarks, he noted:

> "... the arbitrator's award is enforceable so long as it 'draws its essence from the collective bargaining agreement', even if the court thinks the arbitrator misconstrued the contract. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ...
>
> "It might in retrospect have been better if the Court had not said 'draws its essence from the collective bargaining agreement', arresting as this formulation is (it has displaced all its rivals in the marketplace of judicial formulas), but instead had made the test simply whether the arbitrator had exceeded the powers delegated to him by the parties ... The problem with the expression, 'draws its essence from the collective bargaining agreement', is that it invites the kind of error that the district judge fell into in this case, of setting aside an arbitration award because the judge is not satisfied that the award has a basis in a particular provision of the contract."

(App. at A-5 and 6.) Turning to the arbitration award, Judge Posner wrote:

> "... if the arbitrator here had said or implied that although the workers had not complied with a condition precedent to earning their paid vacations fairness required that they get vacations (or pay in lieu thereof), the district judge would have been right to set aside the award. But that would not be a

proper characterization of what the arbitrator did. He applied what is after all a traditional principle of contract law: that you cannot prevent the other party to the contract from fulfilling a condition precedent to your own performance, and then use that failure to justify your nonperformance. See, e.g., Farnsworth, Contracts §8.6, at p. 566 (1982). If Ethyl had laid off these workers without shutting down the plant, they would have had a chance to earn a paid vacation in 1982. For they might have been recalled in 1982, and if so they would have had to work only 200 hours in 1982 to be entitled to a paid vacation that year. The company eliminated that chance; it must bear the consequence." (App. at A-7.)

The Seventh Circuit opinion reviewed a number of the Company's arguments attacking the logic of the Arbitrator's award (App. at A-7 and 8) and then stated:

"But all this just amounts to saying that the arbitrator may have been wrong, maybe even clearly wrong; it does not show that he was doing something other than interpreting the contract . . . [C]ontracts have implied as well as express terms, and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms. Indeed, "as long as a plausible solution is available within the general framework of the agreement, the arbitrator has the authority to decide what the parties would have agreed on had they foreseen the particular item in dispute . . . In such cases judicial review is limited to whether the arbitrator's solution can be rationally derived from sone [sic] plausible theory of the general framework or intent of the agreement." *Desert Palace, Inc., v. Local Joint Executive Bd.*, 679 F.2d 789, 793 (9th Cir. 1982) (citations omitted)." (App. at A-8).

Judge Posner went on to recount a concession in made by the Company at oral argument; Company counsel allowed that the Arbitrator's award would be enforceable if the Company had used trumped up charges to fire its employees on December 30, 1981, in order to deprive them of 1982 vacation pay. Specifically, counsel noted that labor contracts may contain an implied commitment of good faith and that a bad faith discharge would breach that obligation. (App. at A-9.) With this background, Judge Posner went on to describe the Arbitrator's ruling a follows:

> "... He thus found in the contract another implicit commitment by the company, besides a commitment to act in good faith: a commitment to pay for vacations that the workers had earned by working the required number of hours the previous year, in the event the company prevented the workers from satisfying the other condition of their vacation rights (being on the payroll on December 31 of that year) by shutting down the plant. Although this reading of the contract goes beyond merely implying a condition necessary to prevent bad faith, it is a reading of the contract, and not an appeal to sources of duty outside the contract." (Ap. at A-10.)

Finally, the Seventh Circuit admonished:

> "We do not want to be plagued by cases in which companies or unions refuse to comply with arbitration awards merely because they think the arbitrator clearly misinterpreted the collective bargaining agreement." (App. at A-11.)

On or about October 19, 1985, the Company filed its Petition for a Writ of Certiorari to the United States Court of Appeals of the Seventh Circuit (hereinafter "the Petition".)

ARGUMENT

I. The Petition Should Not Be Granted.

Our arguments are simple and straightforward. First, we note briefly that the Arbitrator's award is utterly conventional. In industrial jurisprudence and "the law of the shop," the Arbitrator's award takes its place in a long line of arbitration decisions reaching the same or a similar result. *Mays Landing Water Power Co.*, 12 LA 861 (1949); *L. Hyman Co., Inc.*, 13 LA 800 (1949); *Star Woolen Mill Co.*, 14 LA 185 (1950); *Telescope Folding Furniture Co.*, 49 LA 837 (1967). *See, Brookford Mills*, 28 LA 838 (1957), and *National Plumbing Fixture Corp.*, 49 LA 421 (1967). Even when tested against the decisions of federal judges on the same issue, the Arbitrator's award reaches the same result as a majority of those cases. *International Association of Machinists, Local Lodge 2369 v. Oxco Brush Division of Vistron Corporation*, 517 F.2d 239 (6th Cir. 1975); *Local 58, United Rubber Workers v. Sun Products Corporation*, 521 F.2d 1286 (6th Cir. 1975); *Local 186, United Packinghouse Food and Allied Workers, AFL-CIO v. Armour and Company*, 446 F.2d 610 (6th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Schneider v. Electric Auto-Lite Company*, 456 F.2d 366 (6th Cir. 1972). The Arbitrator's award gains support even from the decision in *Bucholtz v. Swift and Company*, 609 F.2d 317 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980)—the case relied on by District Judge Noland in vacating the Arbitrator's award. *(Supra*, at 5.) Ruling on the rehearing petition in that case, a majority of the Eighth Circuit Court assumed the vacation pay issue should be resolved in exactly the way the Arbitrator resolved it. *Id.*, 609 F.2d at 327. (The Eighth Circuit went on to dispose of that [Section 301/duty of fair representation] case on other grounds. *Id.)*

Second, the basic premise of the Petition is that the Arbitrator ignored "plain" and "unambiguous" contract language and "past practice." (See "Question Presented For Review," page i of Petition). In fact, one of the first observations by the Arbitrator was that in negotiating their contract, the parties had never contemplated that their vacation pay eligibility provisions would apply in a plant shutdown situation. (App. at A-34 and 35) Thus, the application of the contract was anything but "plain." To the contrary, the question of vacation rights in a shutdown was an unanticipated and open issue.

As for "past practice," the Arbitrator was apparently of the belief that a plant shutdown was a *sui generis* situation and that past practice in layoff situations shed little light in altogether different circumstances. ("The present situation is not the equivalent of a layoff in terms of contract interpretation." App. at A-34.) The Arbitrator would not have been the first decisionmaker to have reasoned that "past practice" is usually non-existent in the typically once-in-a-lifetime event of a plant shutdown. *Swift & Co., supra.*, 609 F.2d at 331, n. 7. In its past practice arguments (Petition, p. 6), the Company simply re-hashes the same ground already considered by three decision-makers.

In sum, the very premise of the Petition is faulty; the Arbitrator did not ignore clear and unambiguous language or past practice. Thus, the decision below could not conceivably conflict with other Circuit Court decisions actually involving clear and unambiguous language.

But even if this Court were to reject our arguments above, there is a third reason for denying *certiorari:* there is no conflict between the decision below and any other decision of a Circuit Court on the *precise* issue

involved here. In fact, on that issue, the Circuits are in harmony.

The Seventh Circuit held that an arbitration award "draws its essence" from a labor contract when it grants vacation pay to employees displaced by a plant shutdown, notwithstanding the employee's inability to meet an "on the payroll" requirement, where the arbitrator infers from the contract language an implied commitment that the Company will not shut down the plant and thereby prevent employees who are otherwise eligible for the vacation from meeting that requirement. Petitioner cites six Circuit Court decisions said to conflict—not so much with this holding—but with more general *dicta* of the Seventh Circuit concerning judicial review of arbitration awards. (Petition, pp. 8-11). But none of the decisions relied on by Petitioner involves either a vacation pay eligibility question, a plant shutdown, or a well-established contract doctrine concerning actions by one party that render impossible another party's satisfaction of a condition precedent. Thus, the "conflict" cited by Petitioner is indirect at best. To our knowledge, only one other Circuit has encountered the identical issue involved here (on review of an arbitration award) and its decision is consistent with this one. *Baldwin-Montrose Chemical Co. v. International Union, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO,* 383 F.2d 796 (6th Cir. 1967.)

Nevertheless, if this Court should permit Petitioner to find conflict—not in the holdings of the Circuit Courts —but in their *dicta* concerning review of an arbitrator's award, there is still another reason for denying *certiorari* here. Assuming, *arguendo,* that the Circuits once *had* a conflict of the type described by Petitioner, it is no longer a current conflict. Of the six cases said by the Petitioner

to conflict with the decision below, five were decided in the years 1964, 1976, 1977, 1979, and 1982.

In 1983, this Court stongly reaffirmed the principles of *Enterprise Wheel & Car, supra*, 363 U.S. 593, and, in our opinion, resolved whatever conflict may arguably have been posed by this case and the five pre-1983 decisions cited by the Petitioner. In its 1983 decision in *W. R. Grace and Co. v. Rubber Workers, Local 759, supra*, 461 U.S. 757, this Court upheld an arbitration award ("the Barrett award") whose result was directly contrary to a prior award ("the Sabella award.") Nonetheless, this Court enforced the Barrett award because it "drew its essence" from the contract:

> "...Under well established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960). When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement", id., at 597, 80 S.Ct., at 1361, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. Id., at 598, 80 S.Ct., at 1361.
>
> "...Barrett's conclusions that Sabella acted outside his jurisdiction and that this deprived the Sabella award of precedential force under the con-

> tract draw their "essence" from the provisions of the collective bargaining agreement. Regardless of what our view might be of the correctness of Barrett's contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S., at 599, 80 S.Ct., at 1362.
>
> "Barrett's analysis of the merits of the grievances is entitled to the same deference . . . Again, although conceivably we could reach a different result were we to interpret the contract ourselves, *8/* we cannot say that the award does not draw its essence from the collective bargaining agreement." [Footnote omitted.]

_ U.S. at _, 103 S.Ct. at 2182-2183.

Even if it is assumed that there may have been some conflict between the decision below and the *pre*-1983 Circuit Court decisions cited by the Petitioner, *W. R. Grace* resolves that conflict. Together, *Enterprise Wheel & Car Corp.* and *W. R. Grace* instruct the lower courts to enforce an arbitration award even if it is *wrong*, so long as the award constitutes contract interpretation. There are, of course, any number of ways for an arbitration award to reach a wrong result. One is for the arbitrator to overlook or fail to heed what a court later views as "clear" and "unambiguous" language. Nevertheless, so long as the result is contract interpretation, a court must enforce the award. In short, this Court has already (and recently) answered the question posed by this case. There is no need for this Court once again to enunciate a point of law that was *re*affirmed as recently as two terms ago.

Petitioner alleges a conflict between this case and one other case decided *after the decision in W. R. Grace*

and Company. That case is *Morgan Services, Inc. v. Local 323, ACTWU,* 724 F.2d 1217 (6th Cir. 1984). We note that it is a decision of the Sixth Circuit. We fail to understand how Petitioner can possibly rely on any decision of that Circuit to demonstrate conflict with the decision below. It is the Sixth Circuit that is the leading exponent of the very approach to contract interpretation taken by the Arbitrator here and affirmed by the Seventh Circuit. Indeed, it might be noted that the first three of the six cases relied on by Petitioner as evidence of conflict between the Circuits come from the Sixth Circuit. (Petition, pp. 8-9). To put it simply, the Sixth Circuit would rule in this case exactly as the Seventh Circuit did. In fact, it *has. Baldwin-Montrose, supra,* 383 F.2d 796. And even if the Sixth Circuit were to face this issue in a direct Section 301 action (where no arbitration had taken place), it would also rule as the Arbitrator did. *Oxco Brush, supra,* 517 F.2d; *Sun Products, supra,* 521 F.2d 1286; *Armour and Company, supra,* 446 F.2d; *Schneider, supra,* 456 F.2d. Of all Circuits, it is surely strange for Petitioner to suggest that this case conflicts with decisions of the Sixth Circuit. Giving Petitioner the full benefit of all doubts, is has shown at most a possible conflict *within* the Sixth Circuit, but not a current conflict *between* the Circuits.

Finally, if this Court should be disposed to take up the subject of the Petitioner's "Question Presented for Review", this case is not the most appropriate vehicle. Here, the Seventh Circuit applied the principles of *Enterprise Wheel & Car* and *W. R. Grace* in a correct manner. If other lower courts need still another reminder to follow those principles, that message would best be conveyed by granting *certiorari* in a case in which this Court is inclined to reverse a decision of a Circuit that has misapplied those principles.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1986, three copies of this Brief of Respondent in Opposition were mailed, postage prepaid, to David L. Swider, Esq., 54 Monument Circle, Suite 900, Indianapolis, Indiana, 46204, Counsel for the Petitioner. I further certify that all parties required to be served have been served.

PAUL WHITEHEAD